

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY DENDARD LEWIS,

Defendant and Appellant.

B209406

(Los Angeles County
Super. Ct. No. VA089501)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dewey Lawes Falcone, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, for Plaintiff and Respondent.

Jeffrey Dendard Lewis appeals from his conviction for the first degree murder of his ex-wife's companion. We modify the judgment to award presentence custody credits and, as modified, affirm.

FACTS AND PROCEEDINGS

In 1989, appellant Jeffrey Dendard Lewis married Sharisse Adams. During their 10-year marriage, appellant physically abused Adams once or twice a month, often accompanied by accusations that she had been unfaithful to him. After their fights, Adams sometimes took the couple's children and stayed with her mother for a while. Three times during the marriage, Adams separated from appellant for lengthier periods of several weeks, once in 1991 and twice in 1997. In 1999, appellant and Adams divorced.

About a year after appellant and Adams divorced, they reconciled and reunited as a couple. Although they did not remarry, they bought a house and resumed living as a family with their two children. But renewed disenchantment with the relationship eventually set in, and Adams became romantically involved in late-2004 with a co-worker, Da Shun Shufford. Appellant suspected Adams's affair with Shufford, but Adams denied any unfaithfulness. Following a fight fueled by appellant's suspicions, Adams moved to her mother's house. In the following weeks, appellant repeatedly asked Adams to return home. Eventually, Adams returned and, confirming appellant's suspicions, promised to stop seeing Shufford. On Valentine's Day 2005, Adams ended her affair with Shufford.

Appellant's distrust did not end, and he continued to question Adams about Shufford and tried to call Shufford at work. In April 2005, appellant hit Adams during a fight. Adams moved out of the house for the final time and secretly resumed her relationship with Shufford. After her departure, appellant repeatedly contacted Adams every day with phone calls, text messages, and unannounced visits to her work and mother's home. On May 15, he left Adams a voice mail message, telling her he was going to "deal with" their separation "my way" and that he was "gonna deal with your friend Shun too."

On May 21, Adams and Shufford went out to dinner for what would be Shufford's last night alive. Three or four times before that evening, appellant had visited what he believed was Shufford's neighborhood based on internet searches, hoping to find Shufford. The day before Adams and Shufford went out to dinner, appellant found Shufford's correct address. The next day he retrieved a gun from his storage locker and bought a wig to wear over his shaved head. He drove to Shufford's neighborhood, parked his car, and waited; appellant testified at trial that he wanted to talk to Shufford to confirm his suspicion that Adams was lying to him when she denied she was having an affair. While appellant bided his time, Shufford arrived home at about 9:00 p.m. from his dinner with Adams. As Shufford drove up, appellant got out of his car. Shufford saw appellant, but did not recognize appellant because it was dark and appellant was wearing a wig, and appeared to be waiting for someone. Appellant approached Shufford and asked how long he had been involved with Adams. Shufford replied a few months. Shufford then moved "like a football player, a fake right, run left." Claiming something flew out of Shufford's hand, appellant fired at Shufford hitting him four times. Shufford fell mortally wounded to the ground, where appellant approached him, hit him with the gun, and stomped on his head, fracturing his skull. Appellant then ran away.

The People charged appellant with first degree murder. A jury convicted him and found true the special circumstance of lying-in-wait. The court sentenced appellant to life in state prison without possibility of parole. This appeal followed.

DISCUSSION

A. *Prior Acts of Domestic Violence*

Appellant's contended that intended defense at trial was clinical depression and voluntary intoxication prevented him from forming malice aforethought for murder. Appellant had a history of depression. In 1998, he voluntarily admitted himself to a hospital for four days for treatment of depression and suicidal thoughts. And in 2005

when he killed Shufford, he was again under treatment for depression triggered by Adams's infidelity.

In addition to depression, appellant claimed voluntary intoxication added to his inability to harbor malice aforethought. For his depression in 2005, his doctor prescribed Welbutrin and Trazedone which he was continuing to take when he shot Shufford. Two weeks before Shufford's murder, appellant underwent surgery to repair a torn tendon in his arm. To control his post-operative pain, appellant's doctor prescribed Vicodin. Hours before Shufford's death, appellant took Vicodin and drank a half pint of gin. According to expert testimony, the effect of appellant's ingestion of prescription drugs and alcohol on his thoughts and behavior when he killed Shufford was unpredictable.

Consistent with his defense of depression and voluntary intoxication, appellant strove to paint a picture of a loving family life with Adams, the loss of which sent him into a psychological tailspin. The trial court had initially found to be irrelevant the evidence of domestic violence between appellant and Adams because Adams was not appellant's murder victim. But based on appellant's aim to suggest familial harmony, the court ruled it would allow the prosecution to offer sanitized evidence of domestic violence to assist the jury in drawing a more accurate picture of appellant's relationship with Adams and his reaction to the failure of their relationship. The court thus ruled the prosecutor could offer evidence of a restraining order Adams had received against appellant. The court also ruled the prosecutor could offer sanitized evidence of the occurrence of physical confrontations between appellant and Adams without elaboration of the details of any specific incidents.

During appellant's opening statement, appellant described why he suspected Adams and Shufford were having an affair. He also stated that his discovery of Adams's unfaithfulness triggered his depression that culminated in Shufford's death. Learning from appellant's opening statement the defense appellant intended to advance, the prosecutor asked the court at sidebar to remove its restrictions on the domestic violence evidence the prosecution could offer. The prosecutor asserted that appellant's domestic violence demonstrated appellant sought to dominate and control Adams, thereby

suggesting a motive for appellant to kill Shufford. The court agreed to loosen its restrictions on the domestic violence evidence the prosecutor could introduce. To illuminate the relationship between appellant and Adams and to cast a truer light on appellant not as an innocent, aggrieved ex-husband but rather a controlling former romantic partner, the court permitted the prosecutor to elicit from Adams's testimony that she endured domestic violence once or twice a month during her marriage to appellant. According to Adams, appellant started hitting her about six months into their marriage and hit her "maybe like once a month, maybe every couple of weeks. Whenever he was upset." The court also permitted Adams to testify in broad detail about four of those incidents: appellant's hitting her in the mouth during their separation in 1997, knocking out two front teeth; appellant's pulling a knife on her while they were arguing in his parked car; appellant's punching her while she was pregnant; and appellant's violating a restraining order by ramming his car into her car the day the order was issued.

Appellant contends the court erred in admitting the domestic violence evidence because he was not on trial for committing a crime against Adams. (Cf. Pen. Code, § 1109, subd. (a)(1) [uncharged domestic violence evidence admissible to show likelihood of committing later violent act against same victim].) Appellant contends that because his domestic violence was not directed at Shufford, admission of his acts against Adams amounted to inadmissible character evidence offered only to show his propensity toward violence. We disagree.

We review admission of prior uncharged acts for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Evidence Code section 1101, subdivision (b) permits evidence of uncharged acts to show, among other things, motive. (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Evidence of an uncharged act need not be similar to the charged offense if the purpose of the evidence is to show a defendant's motive; the uncharged act need only have a "direct logical nexus" to the charged offense. (*People v. Daniels* (1991) 52 Cal.3d 815, 857; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) Here, appellant's attempt to control Adams, and his anger when she challenged that control, manifested itself in his violence toward her. Her affair with Shufford was one

such challenge, and his violence toward Shufford was an extension of appellant's effort to control Adams. Accordingly, the domestic violence evidence had a direct logical nexus to Shufford's murder, rendering the court's admission of the evidence a reasonable exercise of its discretion.

Appellant contends the court erred in admitting "all" the evidence of domestic violence. Appellant's contention overstates the amount of evidence the court allowed. The court permitted Adams to tell the jury that appellant assaulted her once or twice a month during their marriage. Undoubtedly, the jury could do the math to calculate Adams was implying scores of attacks, but the court allowed Adams to testify about only four specific instances: knocking out her teeth, pulling a knife on her, punching her while she was pregnant, and ramming her car. Moreover, the court told jurors they could consider the evidence of domestic violence for only a limited purpose. The court instructed:

"Certain evidence was admitted for limited purpose and that evidence was – we had some indication of physical abuse during the marriage. That evidence was admitted for a limited purpose only. And that was admitted for the purpose of establishing either motive or a state of mind of the defendant, limited purpose only. [¶] So again, certain evidence was admitted for a limited purpose. At the time the evidence was admitted, you were instructed it could not be considered for any purpose other than that limited purpose for which it was admitted. Do not consider this evidence for any purpose except for that limited purpose for which it was admitted."

Appellant's contention thus fails because the court allowed only a limited amount of domestic violence and did so only for a limited purpose. The court did not, as appellant states, admit all evidence of domestic violence.

Appellant contends that even if his domestic violence against Adams was relevant, the court should nevertheless have excluded it under Evidence Code section 352 because it was unduly prejudicial. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [error under section 352 to admit relevant evidence where prejudicial effect outweighs probative value].) Appellant's contention fails because the evidence was not overly prejudicial.

Appellant was on trial for having murdered a man with whom he had little, if any, previous dealings. Whatever the reprehensibility of appellant's domestic violence against Adams, none of his assaults of her was life-threatening or sufficiently egregious or inflammatory that they would lead a rational jury to falsely convict appellant of murdering Shufford in order to punish him for having beaten up Adams. Moreover, the domestic violence was highly probative because it provided a link to appellant's motive to kill Shufford, a man who had otherwise done nothing to offend appellant, and to cast doubt on appellant's defense based on intoxication and depression. Accordingly, Evidence Code section 352 did not bar admission of the domestic violence evidence.

B. *CALJIC 2.50 and 2.50.1*

The court instructed the jury that it was allowing the domestic violence evidence for a limited purpose. The court did not, however, instruct the jury with CALJIC 2.50 and 2.50.1. Those instructions tell the jury that it cannot use prior uncharged acts as evidence of a defendant's propensity to commit the charged offense.¹ Appellant contends the court erred in not giving these instructions to the jury. The court did not, however, have a sua sponte duty to read them and appellant did not request them. (*People v. Rogers* (2006) 39 Cal.4th 826, 854 (*Rogers*); *People v. Collie* (1981) 30 Cal.3d 43, 63.) Accordingly, no error occurred in their omission.

Appellant contends that under the facts of his case, the court had a sua sponte duty to instruct with CALJIC 2.50 and 2.50.1. In support, appellant cites *Rogers, supra*. That decision recognized such a duty might arise sua sponte for the "occasional extraordinary case," but this is not such a case. *Rogers* explained an appropriate case involves evidence of past offenses that is "a dominant part of the evidence against the accused" and is "both

¹ CALJIC 2.50 states in part: "[T]his evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes." CALJIC 2.50.1 states in part: "You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crime."

highly prejudicial and minimally relevant to any legitimate purpose.” (*Rogers, supra*, 39 Cal.4th at p. 854; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226.) Neither set of conditions applies here. Domestic violence was not a dominant part of the case against appellant. It consumed only a handful of pages in a reporter’s transcript of a trial that lasted several days. In addition, it was highly relevant to appellant’s state of mind by showing he had a motive to kill Shufford. *Rogers* thus created no sua sponte duty for the trial court to instruct with CALJIC 2.50 and 2.50.1.

C. *Murder and Manslaughter*

Appellant contends the court misinstructed the jury about the differences between murder and manslaughter. Viewing as a whole the court’s instructions governing murder and manslaughter, we see no error.

We begin by noting the court told the jury that the presence of malice elevated manslaughter to murder. Instructing with CALJIC 8.50, the court stated:

“The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the heat of passion that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.”

Appellant notes that the foregoing instruction describes voluntary manslaughter arising from the heat of passion or a sudden quarrel. (Pen. Code, § 192, subd. (a).) Appellant contends the instruction was incomplete, and thus flawed, because it did not highlight that manslaughter exists in two forms: voluntary and involuntary. Appellant’s contention is unavailing.

According to the Use Note for CALJIC 8.50, evidence suggesting involuntary manslaughter obligates the court to instruct with one or both of the following paragraphs from CALJIC 8.51:

- “If a person causes another’s death, while committing a [misdemeanor] [or] [infraction] which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter.”
- “There are many acts which are lawful but nevertheless endanger human life. If a person causes another’s death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.”

Neither of the foregoing definitions of involuntary manslaughter applied here. Shufford died from multiple gunshots fired by appellant. No substantial evidence existed that appellant fired at Shufford during the commission of a misdemeanor or infraction or as the result of criminal negligence. Accordingly, the court properly omitted both parts of CALJIC 8.51 from the jury instructions.

The court did, however, inform the jury of other types of involuntary manslaughter available to appellant based on the evidence offered at trial. The court told the jury: “The crime of involuntary manslaughter due to voluntary intoxication is lesser to that of express malice murder, as charged in count 1. [¶] The crime of involuntary manslaughter due to mental disorder is lesser to that of express malice murder . . . as charged in count 1.” Regarding involuntary manslaughter arising from voluntary intoxication, the court instructed the jury with CALJIC 8.47, which stated:

“If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without an intent to kill and without malice aforethought, the crime is involuntary manslaughter. [¶] This law applies to persons who are not conscious of acting but who perform acts or motions while

in that mental state. The condition of being unconscious does not require an incapacity to move or to act. [¶] When a person voluntarily induces his own intoxication to the point of unconsciousness, he assumes the risk that while unconscious he will commit acts dangerous to human life or safety.”

The court also instructed the jury with CALJIC 3.32 on the effect of mental illness on one’s ability to form a homicidal intent:

“You have received evidence regarding a mental disorder of the defendant at the time of the commission of the crime charged, namely murder in count 1. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated, deliberated or harbored malice aforethought which is an element of the crime charged in count 1, namely, murder.”

Arguably, the court ought to have explicitly stated in its mental disorder instruction that the resulting crime was involuntary manslaughter if appellant had not formed the intent needed for murder. (Such a statement would have paralleled an analogous statement in the involuntary intoxication instruction.) But, if the failure to do so was error, it was harmless. First, the court told the jury when listing appellant’s possible lesser offenses to murder that if appellant killed Shufford “due to mental disorder” his offense was involuntary manslaughter. Second, the jury necessarily found against appellant’s theory of involuntary manslaughter from mental disorder when the jury convicted him of murder, and most especially when it found true the special circumstance of his lying in wait. The court instructed the jury on lying in wait that:

“The term ‘lying in wait’ is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise. . . . The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

By finding appellant had lain in wait in a manner revealing “premeditation or deliberation,” the jury necessarily rejected appellant’s evidence that a mental disorder had reduced his offense to involuntary manslaughter.

D. *Omitting Last Sentence of CALJIC 8.47*

The court instructed the jury with CALJIC 8.47, which stated:

“If you should find that the defendant while unconscious as a result of voluntary intoxication killed another human being without an intent to kill and without malice aforethought, the crime then is an involuntary manslaughter. This law applies to persons who are not conscious of acting, but who perform an act or []motions while in that mental state. The condition of being unconscious does not require an incapacity to move or to act. [¶] When a person voluntarily induces his own intoxication to the point of unconsciousness, he assumes the risk that while unconscious, he will commit acts dangerous to human life or safety.”

The court omitted the last sentence of the pattern instruction because the court concluded it did not apply. That sentence states: “Under these circumstances, the law implies criminal negligence.” The prosecutor agreed with the omission and defense counsel did not object.

Appellant contends the omission was error. According to appellant, the omission misled the jury into believing voluntary intoxication meant defendant killed with malice aforethought and, thus, was guilty of murder. Appellant exaggerates the omission’s effect. First, he does not explain how the jury’s not being told voluntary intoxication implies criminal negligence would make the jury leap to the erroneous conclusion that a killing committed while voluntarily intoxicated is murder. Second, the instruction’s first sentence told the jury exactly the opposite. It stated, “If you should find that the defendant while unconscious as a result of voluntary intoxication killed another human being without an intent to kill and without malice aforethought, the crime then is an involuntary manslaughter.” We therefore reject appellant’s contention that the court erred in omitting the last sentence of the instruction.

E. *CALJIC 2.04*

Police detectives interviewed appellant before they arrested him. During the interview, appellant denied shooting Shufford. He told the detectives he had been miles

away at a friend's home when Shufford was killed. At trial, appellant admitted he lied to the police.

The court instructed the jury on appellant's purported effort to "fabricate evidence." The court told the jury:

"If you should find that a defendant attempted to or did fabricate evidence to be produced at trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt; however, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you people to decide."

Appellant contends the court erred in giving the instruction because the instruction does not apply to a false alibi given to police. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224-1225 ["The manufacture of an alibi before defendant is charged with a crime is more appropriately addressed by CALJIC No. 2.03, concerning a defendant's wilfully false or deliberately misleading statements concerning the charge on which he is now being tried."].) Assuming appellant's contention is correct, he waived the error by not objecting to the instruction at trial. But even if the error was not waived, it was harmless. At worst, the instruction was superfluous because no evidence supported it if the jury accepted appellant's framing of his lies to the detectives as a false alibi rather than "fabricated evidence." (See *Jackson*, at p. 1225.) But even if the jury deemed appellant's false alibi to have been fabricated evidence, the jury's melding of the two factually related, albeit legally distinct, concepts of false alibi and fabricated evidence was harmless because appellant admitted his alibi was a lie.

F. *Presentence Custody Credits*

Appellant served 1099 days in presentencing custody. The court did not award him any credits for that time. Appellant contends, and the Attorney General agrees, the court erred in not awarding presentence custody credits. Accordingly, we will direct that appellant shall receive those credits.

DISPOSITION

The clerk of the superior court is directed to modify the abstract of judgment to reflect an award of 1099 days of presentence custody credits and to forward a copy of the corrected judgment to the Department of Corrections. As modified the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.